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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 214

ADOLPH HOHENSEE,

Petitioner,

v.

NEWS SYNDICATE, INC., ETC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JAMES C. NEWTON,
1934 8th St., N.W.,
Washington 1, D.C.,
Counsel for Petitioner.

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NEWS SYNDICATE, INC., ETC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Adolph Hohensee, prays that a writ of certiorari issue to review the Judgment of the Court of Appeals for the Third Circuit entered in the above entitled case on February 8, 1961, affirming the judgment of the District Court, and holding that under 28 U.S.C. 1406 (a) the trial Court is without power to transfer a case to another District unless personal service is first effected on the defendant.

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported in 286 F. 2d 527 and is appended at page 18 of the appendix.

The opinion of the District Court is unreported, but is appended hereto at page 15 of the appendix.

The jurisdiction of the Court is invoked under 28 U.S.C., Sec. 1254(1).

Jurisdiction

The judgment of the Court of Appeals was entered on February 8, 1961. The time for filing petition for writ of Certiorari in this Court was first extended by Order of this Court to June 9, 1961, and by further Order of this Court to and including the 8th day of July, 1961.

Questions Presented

1. Where jurisdiction is based solely on diversity of citizenship and no personal service was effected on the defendant, did the District Court have power to transfer the case to another District under 28 U.S.C., Sec. 1406 (a)?

Statute Involved

28 U.S.C., Sec. 1406 (a), reads as follows:

"(a) The District Court of a district in which is filed a case laying venue in the wrong division or district shall dismiss. Or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought".

Statement of the Case

Petitioner, Adolph Hohensee, instituted a libel suit against the respondent, News Syndicate, Inc., a New York corporation, based on a newspaper article published by respondent on January 20, 1957, and circulated in the Scranton, Pennsylvania, area. The suit was filed in the Federal Court in Scranton, Pa. Service was erroneously effected on respondent in New York. The respondent moved to quash this service and the District Court accordingly

quashed said service and granted leave to the petitioner to effect proper service upon the respondent within thirty days. Service was then effected on the agent of the respondent in Scranton, Pa.

Upon motion of the respondent the latter service was likewise quashed by the District Court. That thereafter, petitioner moved the District Court to alter or amend its judgment by transferring the case to the proper district in New York. After argument on the question of the power of the District Court to transfer a case to another district, absent personal service upon the defendant, the District Court entered its judgment on April 12, 1960, denying petitioner's motion, for want of power under said statute. (App. p. 17.)

That thereafter petitioner prosecuted his appeal to the Court of Appeals and after a hearing before said Court, the Court of Appeals affirmed the judgment of the District Court by the entry of its judgment of February 8, 1961. It is from the latter Judgment that this petition is prosecuted. (App. p. 18.)

Reasons for Granting the Writ

1

Is Personal Service upon the Defendant, in Diversity Suits, a Condition Precedent to the Operation of 28 U.S.C., Sec. 1406 (a)?

(a) The Courts below rested their respective decisions on the "Sole" gro of the lack of jurisdiction under Section 1406 (a) o .S.C., since there was no personal service effected on the defendant.

This petition, therefore, presents for the determination of this court the Sole Question, namely: Must there

be personal service upon the defendant before the District Court is empowered to act under 28 U. S. C., Sec. 1406(a)?

The foregoing question gives rise to a sharp conflict among the Courts of Appeal of many Circuits, and also among the United States District Courts.

The cases which hold that personal service on the defendant is nonessential to the exercise of the power of the Court under 28 U. S. C., Sec. 1406 (a), are listed below.

(b) Decisions Which Hold That Personal Jurisdiction Over the Defendant Is Not Prerequisite to the Operation of 28 U. S. C., 1406(a):

Americo Contact Plate Freezers, Inc., vs. *Knowles*, 107 U. S. App. D. C. 81, 274 F. 2d. 590 (1960); *Hayes* vs. *Livermant*, 108 U. S. App D. C. 43, 279 F. 2d. 818, (1960); *All State Freight* vs. *Modarelli*, 3 cir., 1952, 196 F. 2d. 1010; *Gulf Research and Development Co.* vs. *Leahy*, 3 cir., 1951, 191 F. 2d. 302; *Gulf Research* vs. *Harrison*, 9 cir., 185 F. 2d 457; *Schiller* vs. *Milt-Clip Co.*, 2 cir., 180 F. 2d. 654; *Untersinger* vs. *United States*, 2 cir., 181 F. 2d. 953; *Orr* vs. *United States*, 2 cir., 174 F. 2d. 577; *Internatio-Rotterdam, Inc.*, vs. *Gesmer Corp.*, 4 cir., 218 F. 2d. 514.

District Courts:

Lumbermans Mutual Casualty Co., vs. *Mohr, et al.*, S. D. Texas, 1949, 87 F. Supp. 727; *Petroleum Finance Corp.* vs. *Stone, et al.*, S. D. N. Y., 1953, 116 F. Supp. 426; *Brandt* vs. *Eastern Air Lines*, S. D. N. Y., 120 F. Supp. 745; *Orzulak*, E. D. Pa., 1958, 168 F. Supp 15. In conflict with the above-cited cases are those listed below and following:

(c) Decisions Holding That Personal Jurisdiction Over the Defendant Is Indispensible to the Operation of 28 U S. C., Sec. 1406 a): The following cases hold that

a District Court Judge is powerless to transfer a case to another District under 28 U. S. C., Sec. 1406 (a), unless service is first effected on the defendant.

Hohensee vs. *News Syndicate, Inc.*, 3 cir., 1961, 286 F. 2d 527, *Goldlawr Inc.* v. *Shubert*, S. D. N. Y., 1959, 175 F. Supp. 793, appeal dismissed. *Goldlawr* vs. *Heiman*, 2 cir., 1960, 273 F. 2d. 729; *McDaniel* vs. *Drotman*, W. D. Ky., 1952, 103 F. Supp. 643; *Wilson* vs. *Kansas City, etc.*, W. D. Mo., 1951, 101 F. Supp. 56; *Fistel* vs. *Beaver Trust Co.*, S. D. N. Y., 1950, 94 F. Supp. 974; *Skilling* vs. *Funk Air Craft Co.*, W. D. Mo., 1959, 173 F. Supp. 939, and *Hargrove* vs. *Louisville & Nashville R. Co.*, 1957, 153 F. Supp. 681.

(d) Conflict of Decisions Should Be Resolved.

The decision of the Court of Appeals for the Third Circuit is not only in sharp conflict with the decisions of the District of Columbia Circuit, the Second, Fourth and Ninth Circuits, but it also seeks to destroy the operational effect of Section 1406 (a) by demanding of said Section the functions which Congress conferred on 28 U. S. C., Sec. 1404.

In the light of the conflict of decisions cited above, petitioner urges this Court to grant this petition for writ of certiorari in order that such conflict may be resolved.

Conclusion

For the reasons hereinabove stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

James C. Newton,
1934 8th St., N.W.,
Washington 1, D.C.,
Counsel for Petitioner.

APPELLANT'S APPENDIX

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 5869

ADOLPH HOHENSEE, P.O. Box 910, Scranton, Pa., *Plaintiff*,

v.

NEWS SYNDICATE, INC., a Foreign Corporation c/ Morris Goodman, 1801 Ariel Street, Scranton, Pa., t/a. ANTHRACITE NEWS CO., 935 N. Washington Ave., Scranton, Pa., Agent, *Defendant*.

DOCKET ENTRIES

Date	Proceedings
1957	
Mar. 4	1—Complaint, and Jury trial demanded.
	2—Summons issued returnable 20 days after service. Copy of complaint, summons and copy handed U.S. Marshal for Service.
Mar. 4	J. S. 5.
Mar. 12	3—Summons returned served 3-6-57, also copy of complaint. (MF&E $3.00).
Mar. 20	5—Motion to dismiss and Notice that said motion will be brought on for hearing 4-28-57, at 11:00 A.M. at Scranton, Pa., and State-
Mar. 20	ment of service thereon.
Apr. 23	4—Plaintiff's resistance to motion to dismiss, and Notice that said motion will be brought on for hearing 4-28-57 at 11:00 A.M. at Scranton, Pa.
Apr. 23	5—Clerk's Minute Sheet—Re hearing on Motion to dismiss complaint. (M).
May 3	Transcript of proceedings held 4-23-57. (Filed in No. 5860 Civil).

Date	Proceedings
1957	
May 3	6—Praecipe for Voluntary dismissal of one of the Plaintiffs, Scientific Living, Inc., pro se, and Certificate of Service thereof. Dismissal entered.
May 3	J. S. 6 as to Scientific Living Inc.
1958	
Sep. 16	7—Affidavit of prejudice against Judge John W. Murphy.
1959	
Oct. 9	8—Copy of letter, dated 9-29-59, from Warden of Medical Center for Federal Prisoners, Springfield, Missouri, to Judge Follmer, stating that Adolph Hohensee was discharged from the Medical Center by minimum expiration of sentence on April 13, 1958.
Oct. 9	
Nov. 11	9—MEMORANDUM of Hon. Frederick V. Follmer, District Judge, and ORDER—Now, to wit., November 11, 1959, in accordance with Memorandum filed this day, motion of defendant to quash service of summons is granted. Plaintiff is allowed thirty days from the date of this Order to effect proper service of summons and complaint. In default thereof, defendant will submit Order for dismissal of the action. (FVF).
Nov. 11	COPY—of Memorandum and Order mailed to Adolph Hohensee, Box 910, Scranton, Pennsylvania, and copy to Counsel for the Defendant.
Dec. 10	10—AMENDED COMPLAINT.

Date	Proceedings
1959	
Dec. 10	11—ALIAS SUMMONS—issued returnable 20 days after service.
	Copy of Amended Complaint, together with Alias summons and copy handed U.S. Marshal for service.
Dec. 16	ALIAS SUMMONS—returned served 12-16-59, together with copy of Amended Complaint. (MF&E $2.00).
Dec. 21	12—MOTION—of Defendant, News Syndicate, Inc., to dismiss Complaint, and
Dec. 21	NOTICE—of Motion will be brought on for hearing on Monday, January 12, 1960 at 11:00 o'clock A.M. at Scranton, Pennsylvania, and
Dec. 21	STATEMENT—of service thereof.
1960	
Jan. 11	13—MEMORANDUM—of plaintiff of points and authorities in opposition to motion to dismiss. The plaintiff submits his brief to the court without oral argument, and
Jan. 11	CERTIFICATE—of service thereof.
Jan. 12	14—MINUTE SHEET—re hearing on motion to dismiss complaint. (F).
	15—OPINION—and
	ORDER—It appearing that the plaintiff has failed to effect proper service upon defendant. It is Ordered that the complaint be and it hereby is dismissed (F).
	Copies of order mailed to Adolph Hohensee, P.O. Box 910, Scranton, Pa. and to counsel for defendant.
Jan. 12	J. S. 6.
Jan. 21	16—MEMORANDUM—of Points and authorities in support of Motion.

Date	Proceedings
1960	
Jan. 21	17—PLAINTIFF's—Motion to alter or amend judgment entered January 12, 1960.
Jan. 21	18—NOTICE—that said Motion will be brought on for hearing on January 29, 1960, at 11:00 o'clock A.M. at Scranton, Pennsylvania.
Jan. 22	19—LETTER—of Clerk, to Adolph Hohensee and Joseph Kreder, Esquire, fixing 2-1-60, at 11 A.M. at Lewisburg, Pa., as time and place for hearing plaintiff's Motion to alter or amend Judgment entered 1-12-60.
Feb. 1	20—MINUTE SHEET—of Clerk, re hearing on Motion to amend or alter judgment. Atty. Newton admitted specially as counsel for plaintiff. Brief filed by defendant, plaintiff to submit brief by Feb. 12, 1960. (F).
Feb. 1	21—BRIEF—of defendant, contra motion to alter or amend Judgment.
Feb. 16	22—SUPPLEMENTAL BRIEF—of plaintiff in support of motion to alter or amend judgment.
Mar. 4	23—DEFENDANT's REPLY—to plaintiff's supplemental brief.
Apr. 12	24—MEMORANDUM—of Judge Follmer, and ORDER—that the motion of plaintiff to Alter or Amend Order of January 12, 1960, by the entry of an order transmitting the action to the appropriate district in the State of New York, be and the same is hereby denied. (F). Copies of memorandum and order mailed to counsel of record and to Mr. Hohensee.
May 12	25—NOTICE OF APPEAL—filed by Adolph Hohensee. Copies of Notice of Appeal mailed to counsel for defendant and the U.S. Court of Appeals.
May 16	26—COST BOND—on Appeal, in the sum of $250.00.
May 27	27—RECEIPT—from Court of Appeals for Notice of Appeal.

AMENDED COMPLAINT

Comes now the plaintiff, Adolph Hohensee, pro se, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, together with the order of this court entered herein on November 11, 1959, and files this his amended complaint as appears hereinabove and hereinafter.

Plaintiff brings this action of trespass against the defendant, News Syndicate, Inc., a foreign corporation, to recover the sum of ten million ($10,000,000.00) dollars which is justly due and payable to the plaintiff upon a cause of action whereof the following is a statement:

1. Plaintiff, Adolph Hohensee, is a citizen of the State of Pennsylvania; and plaintiff, Scientific Living, Inc., is a corporation incorporated under the laws of the State of Pennsylvania. Defendant, News Syndicate, Inc., is a corporation incorporated under the laws of the State of Delaware. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

2. The plaintiff, Adolph Hohensee, is an individual, residing in and a citizen of Greenfield Township, County of Lackawanna, State of Pennsylvania.

3. The defendant, the News Syndicate, Inc., is a foreign corporation, organized and existing under the laws of the State of Delaware, having its principal place of business at 220 E. 42nd Street, New York City, New York, and is and at all times herein mentioned was engaged in the business of publishing a daily newspaper of immense circulation in the City of New York, N. Y.; throughout the rest of the State of New York; in the State of Pennsylvania; in the other forty six States of the United States and elsewhere, called the Sunday News.

4. Plaintiff Adolph Hohensee, a lecturer, conducts a series of lectures on subjects dealing with "Healthful and More Abundant and Cheerful Living".

5. The plaintiff, Adolph Hohensee, carries on his lecture programs throughout the United States, its Territories, Possessions and many Foreign Countries.

6. At the time the acts of the defendant complained of were committed, as alleged, plaintiff was engaged in con-

ducting a series of lectures on "Healthful and More Abundant and More Cheerful Living", in York, Pennsylvania.

7. The defendant at all times referred to and in regard to all acts complained of, acted in a planned, premeditated, evil, vicious and malicious unlawful effort of libel and slander, by publication and word of mouth, as herein alleged, to expose plaintiff to public hatred, contempt, ridicule and disgrace, and to induce an evil opinion of him in the minds of right thinking persons and to deprive him of his friendly society, causing him to be shunned and avoided.

8. The article herein complained of, appearing in the Sunday News of January 20, 1957, which was also captioned as "A Justice Story", is in fact the greatest *Injustice* Story it was possible for the defendant, the News Syndicate, Inc., to perpetrate.

9. The so called "A Justice Story" was written in a depraved and base manner, to make miserable and impoverish the plaintiff, Adolph Hohensee.

10. The acts herein complained of were the result of gross negligence, recklessness, the wanton and complete disregard for the truth.

11. The defendant, the News Syndicate, Inc., in its publication, the Sunday News, of January 20, 1957, stooped so low in its character assassination of the plaintiff, Adolph Hohensee, as to establish a new low in newspaper "yellow journalism". Some of the specific words of libel and slander appearing in the said Sunday News, under the bold print headline

"The Peppermint Tea Medicine Man"

and also captioned as

"A Justice Story"

are as follows:

"* * * A charlatan of marked ability * * *"

"* * * "one of the most reprehensible charlatans in modern medical history." * * *".

"• • • " Hohensee was a con man of marked ability."

• • • "

"• • • that if Hohensee had sold these 'tenderizers' at $25 apiece he would have received a profit of at least $10 on each." • • ".

"• • • Hohensee Park, which was nothing but a run-down wooded area • • •".

"• • • the lots were appraised by a Scranton real estate firm as worth $10 each. • • • ".

12. Not only did defendant, the News Syndicate, Inc., assail, smear and assassinate the character of the plaintiff, but it published and circulated untrue, false and damaging remarks about the excellent blendor made by the well known and reputable firm of the Waring Products Corp., of New York, which corporation is the producer and the manufacturer of the blendor sold by the plaintiff, Adolph Hohensee. The defendant, the News Syndicate, Inc., through its Sunday News said that the blendor contained a very inferior motor. The following specific, vicious, malicious, untrue and false words of libel, condemning the blendor mode by the Waring Products Corporation, and sold by the plaintiff, Adolph Hohensee; are the following:

"• • • "an awfully cheap motor." • • •"

13. The entire newspaper article which appeared on Sunday, January 20, 1957, in the Sunday News, published and circulated by the defendant, the News Syndicate, Inc., was libel and slander, printed under the heavy, bold-type headline of:

"The Peppermint Tea Medicine Man" and
"A Justice Story"

A copy of the above referred to libel and slander is attached to the original complaint and made a part hereof by reference.

14. The matters herein complained of and concerning the plaintiff were premised upon untrue, false and mislead-

ing statements of fact. The libel and slander were written, published and circulated by the defendant, News Syndicate, Inc., through its newspaper, the Sunday News, which is published and circulated as previously indicated herein.

15. The matters herein complained of and concerning the plaintiff are untrue, false, defamatory and damaged the plaintiff.

16. The matters herein complained of and concerning the plaintiff were designed with the evil and malicious intent to break up the lecturing program of the plaintiff and to deprive him of his occupation.

17. The defendant, the News Syndicate, Inc., in all of the above statements, actions, words and conduct, was motivated by oppression, ill-will and fraud. Malice and defamation were intended in all these reprehensible actions. Thus such malicious individual acts, words and publications of the defendant operated to produce all of the harm, loss and damage inflicted upon the name, business and profession of the plaintiff Adolph Hohensee.

18. That defendant, News Syndicate, Inc., has refused to retract the herein referred to acts and conduct of libel and slander.

19. That defendant, News Syndicate, Inc., did not retract the herein referred to acts and conduct of libel and slander.

20. The plaintiff has suffered actual or specific damages, such as loss of income, loss of credit, increased expenses and other damages, directly caused by such actions, in the total sum of $250,000.00.

21. That the plaintiff is entitled to general or exemplary and punitive damages, in the sum of $9,750,000.00, against the defendant because of its malicious wrongful conduct, without reasonable or just cause, as hereinbefore complained of,

WHEREFORE plaintiff prays that he be awarded the verdict of the jury and judgment of the Court as follows:

1. For the actual or specific damages in the sum of $250,000.00.

2. For the general or exemplary and punitive damages in the sum of $9,750,000.00.

3. For the costs of this action.

/s/ Adolph Hohensee, Pro Se
P.O. Box 910, Scranton, Pa.,
Phone: Chapman Lake 12.

Defendant's Motion to Dismiss Complaint

The Defendant moves the Court as follows:

1. To quash the service of summons herein and the return of service of summons and to dismiss the action against the Defendant on the ground that the United States Marshal's Return on Service of Writ shows that the Defendant was served by delivering a copy of the Summons to the office of the Defendant at 220 E. 42nd Street, New York, New York.

2. To dismiss the action on the ground that the Defendant is a corporation organized under the laws of New York and was not and is not subject to service of process within the Middle District of Pennsylvania, nor in the State of Pennsylvania.

Warren, Hill, Henkelman & McMenamin

By s Joseph C. Kreder,
700 Scranton Electric Building,
Scranton, Pennsylvania.

Order

Now, to wit, November 11, 1959, in accordance with Memorandum filed this day, motion of defendant to quash service of summons is granted.

Plaintiff is allowed thirty days from the date of this Order to effect proper service of summons and complaint. In default thereof, defendant will submit Order for dismissal of the action.

s Frederick V. Follmer,
United States District Judge.

DEFENDANT'S MOTION TO DISMISS

The Defendant, News Syndicate, Inc., moves the Court as follows:

1. To dismiss the action or, in lieu thereof, to quash the service of summons herein and the return of service of summons on the ground

(a) That the Defendant is a corporation organized under the laws of the State of New York and was not and is not subject to service of process within the Middle District of Pennsylvania, and

(b) That the Defendant has not been properly served with process in this action,

all of which more clearly appears in the Affidavit of Philip B. Stephens hereto annexed as Exhibit "A".

WARREN, HILL, HENKELMAN & McMENAMIN

By /s/ JOSEPH C. KEEDER.

* * *

Dated: December 21, 1959

MEMORANDUM

On November 11, 1959, this Court granted motion of defendant to quash service of summons because the service purported to have been made was completely ineffective. However, the Court directed that plaintiff should be allowed thirty days from the date of the Order to effect proper service of summons and complaint. Plaintiff failed to effect proper service within thirty days and defendant moved to dismiss the complaint. Argument on this motion was fixed for January 12, 1960, at which time plaintiff failed to appear, either by counsel or in person. The day prior to the scheduled argument, to wit: January 11, 1960, the Clerk of this Court received a Memorandum from plaintiff in opposition to defendant's Motion to dismiss. In this Memorandum plaintiff asked that the action be transferred to

New York under 28 U.S.C. § 1406 (a). This request was not accompanied by a formal motion to transfer under the foregoing section. Copy of this Memorandum was also received by defendant on January 11, 1960.

The facts set forth in the affidavit accompanying defendant's Motion to Dismiss the Complaint being uncontradicted, this Court by written Order dated January 12, 1960, dismissed the action because plaintiff had failed to effect proper service on the defendant, and refused to transfer the case to New York because this Court did not have jurisdiciton over defendant and hence had no power to transfer the case under Section 1406 (a).

The matter is now before the Court on motion of plaintiff, pursuant to Rule 59 (e) of the Federal Rules of Civil Procedure, to alter or amend the judgment entered as aforesaid on January 12, 1960, by the entry of an Order transmitting the action to the appropriate district in the State of New York.

The sole question before the Court is a narrow one, namely, has a District Court, in a case where jurisdiction is based solely on diversity of citizenship, the power to transfer the case to another district under 28 U.S.C. § 1406 (a) when jurisdiction in personam cannot be had in the transferor forum?

This precise question was before the court in Goldlawr, Incorporated, v. Shubert, D.C.S.D.N.Y., 1959, 175 F.Supp. 793. The court here reviewed most of the cases which have considered this question and concluded that the court did not have the power to transfer a case under Section 1406 (a) if it did not have jurisdiction over the defendant. The court stated, inter alia: (page 797)

> "This Court is of the view that Section 1406 (a), which by its terms speaks to defective venue only, cannot be made to do service when there is also a jurisdictional defect. Proper jurisdiction is the more basic requirement. * * * The drafters of the Judicial Code made an express provision for transfer in the event of improper venue. They made no express provision for transfer in the event of lack of jurisdiction. It is unlikely that the drafters relied upon a venue section

to carry along an implicit provision for transfer to cure a jurisdictional defect. * * *"

I am in complete accord with the above case. There being nothing to support the pendency of the action in this Court, the Court is powerless to transfer the same to another district.

Motion to Alter or Amend Judgment of January 12, 1960, by the entry of an Order transmitting the action to the appropriate district will be denied.

April 12, 1960.

/s/ FREDERICK V. FOLLMER,
United States District Judge.

ORDER

Now, April 12, 1960, in accordance with Memorandum this day filed, It is Ordered and Decreed that Motion of plaintiff to Alter or Amend Order of January 12, 1960, by the entry of an order transmitting the action to the appropriate district in the State of New York, be and the same is hereby denied.

/s/ FREDERICK V. FOLLMER,
United States District Judge.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13,275

ADOLPH HOHENSEE, *Appellant*,

v.

NEWS SYNDICATE, INC., etc., *Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued December 12, 1960

Before KALODNER, STALEY and HASTIE, *Circuit Judges*.

OPINION OF THE COURT

(Filed February 8, 1961)

By STALEY, *Circuit Judge*.

This appeal requires us to review a district court's dismissal of an action because of lack of service upon the defendant, and the refusal of that court, in the absence of such service, to exercise its discretion on plaintiff's motion made pursuant to 28 U.S.C. § 1406(a) to transfer the action to another forum, where defendant was amenable to service.

Adolph Hohensee, appellant, filed a complaint in the United States District Court for the Middle District of Pennsylvania to recover for damage resulting from an allegedly libelous newspaper article published by the defendant News Syndicate, Inc., appellee.[1] Jurisdiction was based on diversity of citizenship, the complaint alleging that appellant was a citizen of Pennsylvania, residing in the Middle District, while appellee was a Delaware cor-

[1] Scientific Living, Inc., joined with the appellant in bringing the original action but subsequently filed a praecipe for voluntary dismissal as to itself which was granted.

poration with its principal place of business in New York City.

The district court quashed the service of summons made on appellee at its principal place of business in New York City and allowed appellant thirty days within which to perfect service. The caption of an amended complaint, filed by appellant within that time, read as follows:

"Adolph Hohensee, P.O. Box 910, Scranton, Pa., *Plaintiff*,

vs.

"News Syndicate, Inc., A Foreign Corporation, % Morris Goodman, 1801 Ariel Street, Scranton, Penna., T/A, Anthracite News Co., 935 N. Washington Avenue, Scranton, Penna., Agent. *Defendant*"

An alias summons, together with a copy of the amended complaint, was served on Henry Nogi, attorney for Morris Goodman, at Scranton within the Middle District of Pennsylvania. The district court, concluding this service to be improper, dismissed the complaint and refused to exercise its discretion on appellant's motion under Section 1406(a) to transfer the action to New York where defendant-appellee could be served.

The question raised by appellant as to the effectiveness of the service of appellee by service on Nogi requires no discussion. The record is clear that the only relationship between Nogi's client, Morris Goodman, and the appellee was that of buyer and seller. We need not cite authority for the proposition that such a bare and limited relationship is an insufficient basis for effectuating service of process.

Appellant's contention that the district court had power to exercise its discretion on his motion to transfer absent proper service of appellee does, however, require consideration.[2]

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[2] Ordinarily the decision of a district court granting or refusing a transfer cannot be reviewed by appeal because such an order is not final within the meaning of 28 U.S.C. § 1291. See All States Freight, Inc. v. Modarelli, 196 F.2d 1010 (C.A.3, 1952). Here, however, the judgment of dismissal is final.

On the question raised by appellant there is divided authority. Our research shows that appellant's position is supported by the District of Columbia Circuit which recently held in Amerio Contact Plate Freezers, Inc. v. Knowles, 274 F.2d 590 (C.A.D.C. 1960), followed in Hayes v. Livermont, 279 F.2d 818 (C.A.D.C. 1960), that the absence or presence of jurisdiction of the person of the defendant is immaterial in determining whether a district court has power to act on a motion made under Section 1406(a).[3] Other decisions support the district court's action[4] which, based upon our reading of Section 1406 and a consideration of the purpose behind its enactment, we think was correct and should be affirmed.

Section 1406 28 U.S.C., reads as follows:

> "§ 1406. Cure or waiver of defects
>
> "(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.
>
> "(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.
>
> " • • • "

Before this section was enacted, a court was always required to dismiss an action where there was a mere defect in venue. The rigidity of such a rule was out of keeping with more recent thinking as it pertains to adjec-

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[3] Lumbermen's Mutual Casualty Co. v. Mohr, 87 F. Supp. 727 (S.D.Tex. 1949) also supports appellant's position but involves no discussion of the question raised here.

[4] Goldlawr, Inc. v. Shubert, 175 F. Supp. 793 (S.D.N.Y. 1959), appeal dismissed, 273 F.2d 729 (C.A.2, 1960); McDaniel v. Drotman, 103 F. Supp. 643 (W.D.Ky. 1952); Wilson v. Kansas City Southern Railway Co., 101 F. Supp. 56 (W.D.Mo. 1951); Fistel v. Beaver Trust Co., 94 F. Supp. 974 (S.D.N.Y. 1950). See Skilling v. Funk Aircraft Co., 173 F. Supp. 939 (W.D.Mo. 1959); Hargrove v. Louisville & Nashville Railroad Co., 153 F. Supp. 681 (W.D.Ky. 1957).

tive law. When first enacted in 1948, this section made it mandatory upon the court to transfer a case where improper venue was laid. Fearing abuse, the section was amended in 1949 by authorizing a dismissal or a transfer to a proper forum if it was determined by the transferor court that it was "in the interest of justice" to do so.[5] The sole purpose of this section as well as its companion, 28 U.S.C. § 1404, was to provide a means for curing a defect in venue whether it be improperly laid or improper because of the inconvenience of the parties. Venue has to do with determining the proper place where litigation may proceed. It has nothing to do with determining the extent of the area in which a party defendant may be properly served. The appellant here is, in effect, attempting to turn a venue provision into a device for including New York within the area where appellee can be properly served under Rule 4(d) of the Federal Rules of Civil Procedure in an action commenced in Pennsylvania. We are satisfied that Section 1406 was never intended to serve as a means of avoiding the consequences of a failure to perfect service of process. It would take a clear congressional mandate for this court to allow that section to be used as a shorthand method for assisting a party to effect jurisdiction of the person. See Goldlawr, Inc. v. Shubert, 175 F. Supp. 793 (S.D.N.Y. 1959), appeal dismissed, 273 F.2d 729 (C.A.2, 1960); McDaniel v. Drotman, 103 F. Supp. 643 (W.D.Ky. 1952).

We think that a close reading of the section will make it clear that it is available to a plaintiff only where the court has jurisdiction over the person of the defendant. Subsection (a) provides that venue can be perfected by a transfer to another forum only if it be determined that it is in the "interest of justice" to do so. Before such determination can be made, however, both parties of necessity must at least have an opportunity to be heard. If the defendant is not in court, i.e., he has not been served or has not voluntarily appeared, how can it be said that he has had such an opportunity, for it may well be that

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[5] 2 U.S. Code Cong., Serv., 81st Cong., 1949, pp. 1248, 1253.

he is totally unaware of the action. Under subsection (b), a failure to interpose a timely and sufficient objection to the venue defect constitutes a waiver thereof. The clear import is that the defendant has been brought before the court by service of process or voluntarily appeared, for in allowing inaction to constitute a waiver it presupposes that the defendant has an affimative duty to act. That duty can arise and be imposed upon a defendant only where the court has jurisdiction of his person.

Appellant has cited a number of cases in support of his contention. The larger number are clearly inapposite or can be readily distinguished on their facts.[6] Others deserve discussion. In Schiller v. Mit-Clip Co., 180 F.2d 654 (C.A.2, 1954), the action was transferred *sua sponte* by the district court under Section 1406(a) because the defendant had never done enough business in New York to subject it to suit there. The Court of Appeals in dis-

[6] Untersinger v. United States, 181 F.2d 953 (C.A.2, 1950); Orr v. United States, 174 F.2d 577 (C.A.2, 1949); and Orzulak v. Federal Commerce and Navigation Co., 168 F. Supp. 15 (E.D.Pa. 1958), are admiralty cases which are inapposite for the reasons succinctly stated in another admiralty case appellant cites, Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514, 515 (C.A.4, 1955), where Judge Parker said:

"As the suits were in admiralty, they might have been instituted in any district court of the United States. * * * It is proper to institute a suit in admiralty in a district in which there is no person who can be served with process and no property which can be seized, if it is made to appear that property which can be seized under process therein is expected to be within the district shortly * * *."

In the following cases, the question raised here was not considered, and the court either had jurisdiction of the person of the defendant or there is no indication in the opinion that the transferor court did not have such jurisdiction: All States Freight, Inc., v. Modarelli, 196 F.2d 1010 (C.A.3, 1952); Gulf Research & Development Co. v. Leahy, 193 F.2d 302 (C.A.3, 1951) (an action transferred to the District Court of Delaware pursuant to § 1406, Gulf Research & Development Co. v. Schlumberger Well Surveying Corp., 92 F. Supp. 16 (S.D.Calif., 1950), writ of mandamus denied, Gulf Research & Development Co. v. Harrison, 185 F.2d 457 (C.A.9, 1950)); Untersinger v. United States, *supra*; Orr v. United States, *supra*; State of Maryland ex rel. Brandt v. Eastern Airlines, 120 F. Supp. 745 (S.D.N.Y. 1948). It is also clear that in Orion Shipping and Trading Co. v. United States, 247 F.2d 755 (C.A.9, 1957), found in our research, the transferor court had jurisdiction over the person of the defendant.

missing the appeal and denying plaintiff's petition for mandamus to compel the district judge to revoke the transfer order said, at page 655: "* * * [T]he plaintiff cannot complain because he has not suffered the dismissal which he so richly deserved. * * * Whether we should have any jurisdiction, either by appeal, or by *mandamus*, to review such an order, we need not decide." Thus, the court did not reach or have before it the question presented by this appeal. United States v. Welch, 151 F. Supp. 899 (S.D.N.Y. 1957), and Petroleum Financial Corp. v. Stone, 116 F. Supp. 426 (S.D.N.Y. 1953), also give the appellant little help, for there the district court either expressly relied on or felt itself bound by *Schiller* which reliance we think was misplaced for the reasons given above. See Goldlawr, Inc. v. Shubert, *supra*.

We realize that the *Amerio* and *Hayes* decisions of the District of Columbia Circuit are contrary to our conclusion that a court is without power to act on a motion under 28 U.S.C. § 1406(a) until it has acquired jurisdiction of the person of the defendant. These decisions, however, do not fully discuss the question or refer to decisions supporting our conclusion, but rely solely on decisions which we have discussed and distinguished earlier in this opinion.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13,275

ADOLPH HOHENSEE, *Appellant*,

vs.

NEWS SYNDICATE, INC., a Foreign Corporation; MORRIS GOODMAN, Trading as ANTHRACITE NEWS CO., Agent

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: KALODNER, STALEY and HASTIE, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

February 8, 1961.

Received & Filed February 8, 1961.

IDA O. CRESKOFF,
Clerk.

(7454-2)